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Judicial Cooperation in Environmental Matters: Mapping National Courts' Behaviour in Follow-up Cases

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Abstract

The need to ensure a uniform interpretation and effective application of the large corpus of EU environmental regulation in the jurisdictions of the Member States remains a task of pivotal importance for the Court of Justice of the European Union (CJEU). A quick look at the *CURIA* database reveals that many judgments are handed down every year to clarify the meaning of EU environmental provisions. It is therefore important to study the proper functioning of the tandem composed of the CJEU and the national courts in this field of EU law. In that sense, this article responds to Bogojević's call 'to draw a grander map of judicial dialogues initiated across various Member States'. More specifically, the topic investigated by this article is how Dutch courts have followed up on responses received from the CJEU to their preliminary reference requests in the field of EU environmental law, until January 2017. Almost all the cases we have retrieved from the Netherlands show various degrees of willingness to cooperate with the CJEU. This article highlights the existence of three trends: *full* cooperation, *gapped* cooperation and *withdrawn* cooperation.

Keywords

judicial dialogue – sincere cooperation – preliminary reference – environmental justice

1 Introduction

A quick overview of the case law sections of this journal shows a continuous need for clarity about the meaning of the hundreds of legally binding European Union (EU) acts covering the vast majority of environmental aspects.[1] The need to ensure a uniform interpretation and effective application of this large regulatory body in the jurisdiction of the Member States thus remains a task of pivotal importance for the Court of Justice of the European Union (CJEU). The CJEU's function is to serve as the ultimate interpretative authority on questions of EU law,[2] including when it engages in judicial dialogue with the national courts.[3]

Judicial dialogue is thus an essential feature of the EU legal system, given this particular character of its jurisdiction,[4] a jurisdiction in which the CJEU and the national courts are, to use the words of Advocate General Jacobs, 'bridged together exclusively by the preliminary reference'.[5] It is up to the CJEU and the national courts together, as a shared responsibility,[6] to rule on matters

1 With soil law and judicial protection in environmental matters probably representing the two fields in which EU environmental law is at its scarcest. On soil, Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM(2006) 232 final. On environmental justice, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final. They were both withdrawn in 2014, see [2014] OJ C 153/3.

2 C.O. Lenz & G. Grill, 'The Preliminary Ruling Procedure and the United Kingdom' [1996/19] *Fordham International Law Journal* 844–865; E. Paunio, 'Conflict, Power, and Understanding – Judicial Dialogue Between the ECJ and National Courts' [2010/4] *Journal of Extreme Legal Positivism* 5–24; Case C-6/64 *Flaminio Costa* v *E.N.E.L.* [1964] ECR, ECLI:EU:C:1964:66; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 326/47 Articles 19 TEU, 267 TFEU.

3 R. Allan, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' [2007/1] *European Journal of Legal Studies* 121–136; see also R.J.G.M. Widdershoven 'Judicial Protection' in J.H. Jans & S. Prechal (Eds.), *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015) 333–346, for an analysis of the binding character of CJEU preliminary rulings.

4 Case Opinion 2/13 [2014] ECLI:EU:C:2014:2454.

5 F. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' [2003/38] *Texas International Law Journal* 547–556.

6 Inaugural lecture of Professor J. Langer at the University of Groningen: J. Langer, 'The Preliminary Ruling Procedure: Old Problems or New Challenges?' (2016) Inaugural Lecture at the University of Groningen 3/2015, <ssrn.com/abstract=2885256>.

of EU law.[7] The preliminary reference procedure therefore plays a key role in guaranteeing that EU law is uniformly applied across the Member States.[8]

It is therefore important to study the proper functioning of the tandem composed of the CJEU and the national courts in this field of EU law. This paper aims at making a further contribution in this regard. Several studies have considered the advantages and shortcomings of the preliminary reference mechanism, both in general[9] or specifically to environmental matters,[10] and whether questions are asked and answered (the upload phase) correctly. Far less attention has been paid to what occurs after the CJEU has responded to the national judges (the download phase).[11] The research question to be addressed in the download phase thus concerns the manner in which national courts administer the replies received from the CJEU following a preliminary reference in the field of environmental protection. This question has two aspects. First, it concerns the manner in which the referring national court reacts to the CJEU's answer. Second, it concerns the manner in which other national courts react to the CJEU's answer in the light of the unwritten *stare decisis* system confirmed by the '*acte eclaire*' doctrine declared in *Da Costa*[12] and *CILFIT*.[13] This paper

7 Jacobs, *supra* n. 6.

8 Case C-166/73 *Rheinmühlen Düsseldorf* v *Einfuhr* [1974] ECR-0033, ECLI:EU:C:1974:3.

9 See for the general aspects of the procedure: L. Hoinuf and S. Voigt, 'Analyzing Preliminary References as the Powerbase of the European Court of Justice' [2015/39] *European Journal of Law and Economics* 287–311; N. Fenger & M. Broberg, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2014); C. Timmermans, 'The European Union's Judicial System' [2004/41] *Common Market Law Review* 393–405; T. Tridimas, 'Knocking on Heavens Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling System' [2003/40] *Common Market Law Review* 9–50; Langer, see *supra* n. 6.

10 V. Heyvaert, J. Thornton & R. Drabble, 'With Reference to the Environment: the Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary' [2014/130] *Law Quarterly Review* 413–442.

11 M. Bobek 'EU Law in National Courts: Viking, Laval, and Beyond' in M.R. Freedland & J. Prassl (Eds.) *Viking, Laval and Beyond* (Oxford: Hart Publishing 2014) 323–337. S. Bogojević, 'Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary' *Journal of Environmental Law* [2017/29] 263–283.

12 Joined Cases C-28 to 30/62 *Da Costa en Schaake* [1963] ECR 61, ECLI:EU:C:1963:6.

13 Case C-283/*81 Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* [1982] ECR 3415, ECLI:EU:C:1982:335; See also H. Rasmussen, 'The European Court's Acte Clair strategy in C.I.L.F.I.T' [1984/9] *European Law Review* 242–259; A. Arnull, 'The Use and Abuse of Article 177 EEC' [1989/52] *The Modern Law Review* 622–639; F. Mancini & D. Keeling, 'From CILFIT to ERT: The Constitutional Challenge Facing the European Court' [1991/1]

addresses only the first aspect, leaving the latter for a follow-up study. In this regard, this paper represents the 'third step' in the project of mapping judicial dialogue in environmental matters.

The first step was undertaken by Bogojević, who addressed how Swedish courts react to the CJEU's answers to their referred questions.[14] As further discussed in Section 2.3, she mapped the Swedish courts' behaviour and unfolded four different categories of judicial dialogue: *interchanged dialogue*, *gapped dialogue, interrupted dialogue* and *silenced dialogue*.[15] Squintani and Rakipi who focused on the UK undertook the second step.[16] After re-framing judicial dialogue in terms of 'judicial cooperation', they unveiled three new categories of such cooperation: *full* cooperation, *fragmented* cooperation, and *presumed* cooperation.

As the vast majority of the map is still uncharted, this paper focuses on judicial dialogue and judicial cooperation between the CJEU and Dutch courts. Similarly to Sweden and the UK, the Netherlands has made use of the preliminary reference procedure in environmental matters several times. Yet, this legal order follows a different legal tradition than those in the UK and Sweden, making it a suitable candidate for the mapping exercise.

To properly present our empirical findings, it is important first to establish the common denominators of the research (Section 2). Section 3 then provides the empirical data, based on the mapping of Dutch courts practice in environmental matters, followed by a synthesis in Section 4. As shown in Section 3, one new category demonstrating judicial cooperation, that of *withdrawn* cooperation, should be added to the judicial dialogue map, when we look at the behaviour of Dutch courts in environmental matters. In other cases, Dutch court behaviour can be categorised at the end of two existing categories, *full* cooperation and *gapped* cooperation. Together with the findings from the UK and Sweden, and the new studies under development, these empirical studies will flesh out a map of the judicial dialogue download phase in EU environmental matters. Once the actual shape of judicial dialogue in EU environmental

Yearbook of European Law 1–13; P. Allott, 'Preliminary Rulings: Another Infant Disease?' [2000/25] *European Law Review* 538–547; Tridimas, see *supra* n. 9; P. Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This' [2004/41] *Common Market Law Review* 177–190; N. Fenger & M. Broberg, 'Finding Light in the Darkness: On the Actual Application of the Acte Éclairé Doctrine' [2011/30] *Yearbook of European Law* 180–212; Heyvaert, Thornton & Drabble, see *supra* n. 10.

14 Bogojević, see *supra* n. 11.

15 Ibid.

16 L. Squintani & J. Rakipi, 'Judicial Cooperation in Environmental Matters' *Environmental Law Review, 2018 DOI: 10.1177/1461452918767791*.

matters is described, an in-depth comparative research project can be conducted to unveil the reasons for the empirical findings presented in this paper and the coming ones described.

2 Setting the Stage: Judicial Dialogue and Judicial Cooperation in Preliminary References in Environmental Matters

This section defines the common denominators of this research. It explains the linkage between existing theories on judicial dialogue and the two specific studies on the mapping of judicial dialogue in environmental matters. To this extent, it is based on Squintani and Rakipi (2018).[17] This anchoring is necessary to ensure alignment between the empirical studies, while allowing this paper to be self-sustaining, thus readable without the need of reading the other papers first. This section accordingly provides an account of what is meant by 'judicial dialogue' and its micro dimension 'judicial cooperation' (Section 2.1), preliminary references in 'environmental matters' (Section 2.2), the *known* categories under which national courts responses to the CJEU's answers can be classified (Section 2.3), and the role played by the variables influencing judicial dialogue (Section 2.4).

2.1 *The Micro Dimension of Judicial Dialogue: Judicial Cooperation*

There are various kinds of judicial dialogue.[18] Jacobs highlights the two main features of the internal judicial dialogue in the EU legal system. The first main feature is the 'constitutional' judicial dialogue, i.e. the jurisdiction of the CJEU to hear complaints lodged by other EU institutions or the Member States.[19] Second, and object of this contribution, there is a judicial dialogue through the preliminary reference mechanism, or what Jacobs considers "[…] *the most important feature of the judicial system of the Community* […]".[20] However, we argue that it is only possible to speak of a dialogue between judges at the macro level, at the level at which a national judiciary is considered as a whole. At the micro level, when considering the behaviour of individual courts, it is impossible to speak of a dialogue, simply because asking a question and receiving an answer can hardly be considered a dialogue. To summarise the procedure,

17 Ibidem.

18 Rosas, see *supra* n. 3.

19 Jacobs, see *supra* n. 5.

20 F. Jacobs & A. Durand, 'References to the European Court: Practice and Procedure' [1976/35] *The Cambridge Law Journal* 192.

lower courts have a right to ask a preliminary question,[21] courts of last instance have an obligation in this regard,[22] and the CJEU has a duty to answer these questions. The national court referring the question has to comply with the CJEU's answer,[23] but it does not have to report its final judgment to the CJEU. A quick look at the *CURIA* and *Eurlex* databases shows that information about the continuation of national proceedings is usually missing. The CJEU's recommendations underline the desirability of a practice where national referring courts would report back to the CJEU how they have ruled on the matters subject to the preliminary question, in light of the principle of sincere cooperation.[24] Yet when questioned, the CJEU only confirmed that the preliminary ruling is binding on the referring court without providing any comment on why the majority of national cases could not be located.[25] How the national courts respond to the CJEU's answers can thus hardly be considered as directed at the CJEU, and therefore at best amounting to a dialogue of the deaf.[26] Proposals have been made to improve the dialogue, ranging from making a better use of Article 101 of the Rules of Procedure to inviting national referring judges to participate in the hearing before the CJEU, but they are not actually applied.[27]

21 Article 267(2) TFEU.

22 Article 267(3) TFEU.

23 Case C-29/68 *Milch, Fett und Eierkontor GmbH* v *Hauptzollamt Saarbrücken* [1969] ECR-165, ECLI:EU:C:1969:27; See also H. Schermers, *Judicial Protection in the European Communities* (Deventer: Kluwer, 1976), who at page 392 shows that most national courts seem to support this rule.

24 Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings (2012/C338/01), issued by the Court of Justice of the European Communities, OJ C 160, 28.5.2011.

25 Email correspondence with the CJEU, through Press and Information Unit, received on 9 March 2017. The question asked of the CJEU was whether there is any general practice according to which the national courts have to report the outcome of the national decision following a preliminary reference, and whether the CJEU felt that this practice should be improved. The CJEU chose not to address this issue, opting instead for a general answer which essentially only conveyed information on where to find the Court of Justice's decisions, namely *curia.com*.

26 Theories on dialogue define dialogues as a process in which 'there is no attempt to gain points, or to make your particular view prevail. Rather, whenever any mistake is discovered on the part of anybody, everybody gains. It's a situation called win-win [...] in which we are not playing a game against each other, but with each other. In a dialogue, everybody wins'. D. Bohm & L. Nichol, *On Dialogue* (London: Routledge, 1996); Bobek, see *supra* n. 11.

27 Langer, see *supra* n. 6; see in Dutch <njb.nl/blog/prejudiciele-samenwerking-en-dialoog.18560.lynkx> for a critical response to the suggestions by Advocate General

In light of the normative background of the preliminary question and answer and the lack of a real discussion between the two main parties to the procedure, we will only speak of *cooperative* or *uncooperative* dialogue at macro level. Instead, at micro level we prefer to discuss in terms of sincere *cooperation* rather than judicial dialogue. Indeed, the principle of sincere cooperation goes hand-in-hand with the objective of the preliminary reference itself. First, because a judicial system which is built upon the division of competences between the national courts and the CJEU calls for a greater cooperation.[28] Second, since it is through the correct application of preliminary references that the national courts are offered the opportunity to demonstrate a cooperative attitude towards the CJEU *par excellence*.[29] In this regard, it could debatably be argued that the willingness of the national courts to refer questions to the CJEU might also indicate their willingness to give effect to its rulings.[30] Yet rather than being based on mutual understanding, judicial cooperation can be affected by elements of conflict and a struggle for power, as wisely remembered by Paunio.[31] Ascertaining where this willingness or unwillingness comes from would require an inquiry into the perceptions of EU law in the eyes of national courts,[32] but also a sociological inquiry into a Member State's approach to the EU[33] as such, which is not the objective of this paper.

2.2 *Defining the Common Denominators: 'Environmental Matters'*

The concept of 'preliminary references in environmental matters' is a term in need of refinement. If it is understood in its broadest sense, it would encompass each case under Article 267 TFEU dealing with environmental issues. In turn, the concept of 'environmental issues' in its broadest sense would encompass – alongside more traditional environmental matters[34] – nuclear

Wattel (in Dutch), see <europeancourts.blogspot.nl/2016/05/prejudiciele-procedure-iedereen-doet.html>; see also R. Barents, *Procedures en Procesvoering voor het Hof van Justitie en het Gerecht van eerste aanleg van de EG* (Deventer: Kluwer, 2005).

28 T. Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' [2012/9] *International Journal of Constitutional Law* 737–756.

29 S. Prechal, 'Communication Within the Preliminary Rulings Procedure Responsibilities of the National Courts' [2014/21] *Maastricht Journal of European and Comparative Law* 754–762.

30 Schermers, see *supra* n. 23.

31 Paunio, see *supra* n. 2.

32 Lenz & Grill, see *supra* n. 2.

33 P. Craig 'Report on the United Kingdom' in J.H.H. Weiler and others, *The European Court and National Courts-Doctrine and Jurisprudence* (Hart Publishing, 1998) 197.

34 Such as water, air, soil, industrial emissions, environmental damage etc.

and other energy issues, animal health issues, product standards when linked to environmental concerns, national justifications of EU law, especially in the context of the fundamental freedoms, etc. Such a broad approach, although suitable for understanding the relationship between national courts and the CJEU, would not provide a clear picture of whether the EU environmental law acquis is interpreted and applied uniformly. Moreover, a broad approach to the concept of 'EU environmental law' would increase the chances of cases being added or omitted improperly from the analysis. The narrowest approach to the concept of 'preliminary references in environmental matters' would be to look at cases under Article 267 TFEU in which an interpretation of acts based on current Article 192 TFEU was required. Such a narrow approach would ensure the highest degree of consistency in the comparative approach. Yet it would exclude from the analysis cases which are usually considered 'environmental cases', but which relate to an EU legal act which is not based on Article 192 TFEU for the simple reason that the centre of gravity test favoured the application of a different legal basis. A compromise between the broadest and the narrowest approaches was achieved by searching Curia for preliminary references from the Netherlands concerning: *environment*, *energy* and *provisions governing the institutions*. The results where then filtered for judgments which did not concern EU acts as defied in Article 288 TFEU, having as their primary or explicit secondary objective the protection of the environment.

2.3 *Categories of Judicial Cooperation*

The cases retrieved by means of the research criteria mentioned in Section 2.2 can then be analysed to identify the kind of judicial cooperation taking place. In this regard, all the cases can be categorised into two main groups: cases supporting the existence of a *cooperative* dialogue, in which national courts can be considered as following the CJEU's answers, and cases supporting the existence of an *uncooperative* dialogue, in which national courts cannot be considered to be following the CJEU's answers. Uncooperative dialogue arises when the two main positive obligations and three negative obligations binding the national courts according to Verhoeven are not respected.[35] The positive obligations are that the courts should ensure the effective application of EU law and the protection of rights stemming from Union legislation, and the negative obligations are that they should abstain from measures which impede the

35 M. Verhoeven, *The Costanzo Obligation: The Obligations of National Administrative Authorities in the Case of Incompatibility Between National Law and European law* (Cambridge: Intersentia, 2011).

effectiveness of EU law, the proper functioning of the internal market or the process of Union integration.

It is within the category of cases sustaining the existence of an uncooperative dialogue that Bogojević's categories can be located, albeit renamed in terms of *interchanged cooperation*, *gapped cooperation, interrupted cooperation* and *silenced cooperation*,[36] for the reasons indicated in Section 2.1, *interchanged* cooperation means that there is an interchange of values. The preliminary reference is absorbed into national law and applied as though it were national case law.[37] For example, in the *Gävle Kraftvärme* the CJEU's had clarified what 'incinerator' meant under the Waste Incineration Directive.[38] The Swedish Supreme Court tasked a lower court to apply the criteria set out by the CJEU. In doing so, the lower court only referred to the Swedish Supreme Court ruling and not to the CJEU's ruling.[39] The lower national court did not therefore treat the preliminary reference as though the information were provided by the CJEU.[40] *Gapped* cooperation signifies that there is a lack of judicial dialogue between the CJEU and the national court. There can be instances where a national court questions the validity of the CJEU's ruling.[41] For example, in the *Billerud* case the national court, after receiving the CJEU's ruling, considered whether the CJEU's interpretation of the ETS Directive complied with the European Convention of Human Rights.[42] This was done without making further references to the CJEU. There is then *interrupted* cooperation, which means that national law may have been revised, and/or facts added, rendering the preliminary reference useless while the procedure remains ongoing.[43] For example, in *Jan Nilsson* the relevance of the CJEU's answer to the question of whether stuffed species fell under the CITES Regulation lost importance as the criminal offence for trading in such species was abrogated, leading to the dropping of the criminal charges against Mr Nilsson.[44] Finally, Bogojević proposes a category of *silenced* cooperation, covering cases where the national

36 Bogojević, see *supra* n. 11.

37 Ibid.

38 Case C-251/07 *Gävle Kraftvärme* [2008] ECR I-07047, ECLI:EU:C:2008:495; Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste [2000] OJ L 332/91.

39 Bogojević, see *supra* n. 11.

40 Ibid.

41 Ibid.

42 Case C-203/12 *Billerud* [2013] Electronic Report of Cases, ECLI:EU:C:2013:664.

43 Bogojević, see *supra* n. 11.

44 Case C-154/02 *Jan Nilsson* [2003] ECR I-12733, ECLI:EU:C:2003:590.

court does not mention the preliminary ruling and ignores it.[45] For example, in *Mickelsson and Roos* the national court ultimately cleared Mr Mickelsson and Mr Roos of the criminal charges on grounds different from the ones considered in the CJEU's ruling, which was not even mentioned.[46] Although these cases do not concern the interpretation of an EU Directive aiming primarily or secondarily at environmental protection, and would thus fall outside the scope of the research based on the criteria set out in Section 2.2, they still represent cases where a national court has not included the reasoning provided by the CJEU in its national ruling. The CJEU's ruling is thus ignored.

While Bogojević's categories represent cases of uncooperative dialogue, Squintani and Rakipi's categories represent three different cases of cooperative dialogue. First, they identified cases of *full* cooperation, i.e. cases where the national court applies the CJEU's judgment to the letter. This was the case for example in *R* v *Secretary of State for the environment* (*ex parte Society of Birds*).[47] Fully in line with the CJEU's interpretation,[48] the House of Lords quashed the decisions handed down by the Court of Appeal and the High Court and declared invalid the decision of the Secretary of State regarding the delineation of a special protection area under the Wild Birds Directive, on the grounds that the Secretary of State had taken economic requirements into consideration in reaching the decision in question. Second, they identified cases of *fragmented* cooperation, where the CJEU decides to reformulate the question and the national court applies the CJEU's ruling inasmuch as it can be applied the part of the answer that it considers relevant. This category differs from Bogojević's *gapped* category in that in the latter, the national court would omit certain parts of the issue when requesting a preliminary reference, and the CJEU would rule only on the other parts. In the former, the national court does not omit any part of the problem in its question, but instead choses to only engage with the parts of the preliminary reference response that it deems helpful for delivering its judgment, while ignoring the reasoning of the rest. This was the

45 Bogojević, see *supra* n. 11.

46 Case C-142/05 *Mickelsson & Roos* [2009] ECR I-04273, ECLI:EU:C:2009:336.

47 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1997] Env LR 431. The file of the national follow-up case is actually missing. We could not retrieve the national judgment itself from Bailii, Westlaw, the website of the House of Lords or any other source. Information about the follow up judgment were retrieved from Eurlex, 'Document 81997UK0313(04)' (Europaeu, 13/03/1997) <http://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:81997UK0313(04)&qid=1502184875824> accessed 11 August 2017.

48 For the CJEU ruling see Case C-44/95 *Regina* v *Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds* [1996] ECR I-03805, ECLI:EU:C:1996:297.

case in the *Client Earth* case concerns air quality management.[49] The CJEU had rephrased one of the UK Supreme Court, which concerned a temporary exception under Article 22 of the Air Quality Directive.[50] In turn, the UK Supreme Court considered the answer of the CJEU inconclusive to solve a part of the case. The Supreme Court was willing to apply the Commission's reasoning and deem Article 22 non-mandatory, but given that the legal deadlines had already expired at that time, the court deemed this issue irrelevant.[51] Finally, Squintani and Rakipi introduced the *presumed* cooperation category, where the CJEU's judgment is not applied, because the party which is deemed to have lost before the CJEU withdraws from the proceedings, expecting full the decision to be applied in full by the national judge. It can happen that the party losing the case before the CJEU withdraws from the national proceedings. In such cases the judicial cooperation chain breaks, and the national decision 'disappears', making it impossible to gauge the national court's degree of compliance.[52] Yet, given that the case was withdrawn because the party predicted full compliance on the part of the national judge, we consider these cases examples of presumed *cooperation*, rather than uncooperation. This was for example the case in *Seaport* v *Department of Environment*.[53] Upon delivery of the judgment, which was detrimental for the position of Seaport, Seaport withdrew its claim, so it was never further determined by the national court.[54]

2.4 *The Role of Factors Influencing Judicial Dialogue and Judicial Cooperation*

It goes without saying that as in any important cooperation, good communication in judicial matters is extremely important. This begins in the upload

49 *R* (*on the application of Client Earth*) v *Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28, para. 27.

50 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1.

51 *R* (*on the application of Client Earth*) v *Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.

52 This type of withdrawal must be distinguished from when, for instance, parties agree a settlement and the national court withdraws the reference request. In this case, the CJEU will not rule on the matter, unless it has already given notice of a date on which its decision will be communicated. Article 100(1) of the Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012; see also Case C-210/06 *CARTESIO Oktató és Szolgáltató bt* [2008] ECR I-09641, ECLI:EU:C:2008:723.

53 *Case 474/10 Department of the Environment for Northern Ireland v Seaport (NI) Ltd and Others ECLI:EU:C:2011:681*.

54 As confirmed by email from the case counsel James Maurici, Landmark Chambers, 8 March 2017.

phase, where the national court must pose well formulated questions and provide additional information if necessary.[55] Intervening parties, especially the Member State from which the questions originate, should help in providing a clear picture of the subject matter of the question, while refraining from changing its focus.[56] From the CJEU's perspective, it must be borne in mind that answering in abstractions and general principles may in fact be the best way to provide national courts with the rules needed for a broad application of the CJEU's interpretation to the facts at hand, but on the other hand the Court in Luxembourg must accept that by doing so it is not controlling the outcome of concrete cases.[57] Indeed, this approach could lead to the rulings provided by the CJEU being considered too theoretical by national judges to resolve the case in question.[58] Judges might then choose not to apply such rulings.[59]

As such, the CJEU is required to be more precise if it wishes to avoid complicating the delivery and reception of a preliminary ruling, because as Prechal maintains, just like communication in other spheres of life, something can always go wrong with judicial communication.[60] To this end, the CJEU tries to help preserve the interpretative uniformity of EU law by delivering *guidance cases* which present a set of specific circumstances to be taken into account to interpret a certain provision.[61] A step further in controlling the outcome of national cases would be for the CJEU to deliver *outcome cases*, in which the CJEU would only state that a Member State, for instance, failed to implement a directive correctly, thus leaving to the national court only the outcome of striking down the decision taken in breach of EU law.[62]

The different working languages of the national and EU courts, in this case French and English, as well as differing drafting practices, can also influence judicial dialogue and consequently how national courts follow up CJEU's rulings.[63]

All these variables are important to understanding why a national court behaves in a particular way, but they are irrelevant as far as this study's mapping exercise is concerned. Indeed, as in Bogojević's study, the question lying at the

55 Langer, see *supra* n. 6.

56 We are grateful to J. Langer for pointing out to us the importance of the role of national agents in the context of preliminary references procedures.

57 G. Davies, 'Activism Relocated: The Self-restraint of the European Court of Justice in its National Context' [2012/19] *Journal of European Public Policy* 76–91.

58 Bobek, see *supra* n. 11.

59 Ibid.

60 Prechal, see *supra* n. 29.

61 Tridimas, see *supra* n. 9; Ibid.

62 Ibid.

63 Bobek, see *supra* n. 11.

heart of this article is *how* national courts react to a CJEU ruling, and not *why* they react in a particular way. The variables indicated in this section are relevant for follow-up studies explaining the meaning and relevance of the finding presented in this study. Such follow-up studies will also have to take into account the meta-juridical aspects related to judicial cultures and national attitudes towards the EU integration process. The comparative methodology needs to link the national experiences together requires a rigid framework to avoid comparing 'apples' and 'pears', hence requiring the setting up a broad research project with the help of external funding, such as the H2020 – funding programme, to be applied. Accordingly, while we will keep these variables in mind, we do not address the 'why' question in this study. We will confine ourselves in Sections 3 and 4 to indicating whether, based on the information at our disposal, any or all of the variables mentioned in this section can be observed. This does not detract from the relevance of this study. As stated in the introduction, it is only possible to organise and conduct a research project on the explanatory reasons of the empirical findings once it is known how the judicial dialogue in environmental matters is actually shaped.

3 Dutch Judges as European Judges in the Context of Preliminary References in Environmental Matters

Bogojević's contribution and Squintani and Rakipi's contribution have demonstrated the existence of seven categories of judicial cooperation and uncooperation between Swedish and UK courts and the Court of Justice. As shown in this section, one new category demonstrating judicial cooperation, that of *withdrawn* cooperation, should be added to the judicial dialogue map, when we look at the behaviour of Dutch courts in environmental matters. In other cases, Dutch court behaviour can be categorised at the end of two existing categories, *full* cooperation and *gapped* cooperation.

The preliminary reference procedure is used relatively often in Dutch national courts as compared to national courts in other Member States.[64] For environmental cases this is not different.[65] Between 1995 and 2016,[66] 27 questions

64 Fenger & Broberg, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2014).

65 L. Krämer, 'The Commission's Omission to Use Article 267 TFEU as a Tool to Enforce EU Environmental Law' [2016/13] *Journal for European Environmental & Planning Law* 255–269.

66 This period is examined here because it is the period in which relevant data could be found.

concerning EU environmental law were referred to the Court of Justice by national courts from the Netherlands.[67] From the 27 referrals, 11 could not be used for the current research for differing reasons.[68] The other 16 concerned matters such as a Natura-2000 site,[69] emissions from self-heating of coal,[70] the faulty establishment of a correction factor,[71] emission reduction programmes,[72] the construction of power stations,[73] genetically modified corn and its place of introduction,[74] mechanical fishing of cockles,[75] the scope of the term

67 To find the relevant preliminary rulings the site curia.europa.eu was used. It was specified on 'environment' 'preliminary reference procedure' & Language Dutch. Some Belgian cases fell under the specification, however they were not taken into account for this research.

68 Cases withdrawn: Case C-307/00 *Oliehandel Koeweit BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [2003] ECR I-01821; Case C-418/97 *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer.* Cases requested yet lost in renewal of archive systems: Case C-81/96 *Burgemeester en Wetherhouders van Haarlemmerliede en Spaarnwoude* [1998] ECR I-03923; Case C-393/92 *Gemeente Alemlo v Energiebedrijf Ijsselmij*; Case C-125/88 *H.F.M Nijman* [1989] ECR 3533; Case C-124/80 *Van Dam* [1980] ECR 1447; Case C-185/78 *Van Dam* [1979] ECR 2345. Cases suspended: Case C-192/96 *Beside & Besselsen v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-04029. Request for preliminary ruling found inadmissible: Case C-240/12 *EBS Le Relais Nord-Pas-de-Calais* [2013] Electronic Reports of Cases; Cases requested from relevant courts but not yet received: Case C-259/05 *Omni Metal Service* [2007] ECR I-04945; C-202/94 *Van Der Feesten* [1996] ECR I-00355.

69 Case C-281/16 *Vereniging Hoekschewaards Landschap* [2017] Electronic Report of Cases; Case C-521/12 *T.C. Briels e.a. tegen Minister van Infrastructuur en Milieu* [2014] Electronic Report of Cases; Raad van State C-201110075/4/R4 & 201201853/3/R4.

70 Case C-158/15 *Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ NV tegen Bestuur van de Nederlandse Emissieautoriteit* [2016] Electronic Reports of Cases; Raad van State C-201404521/2/A1.

71 Case C-191/14 *Borealis Polyolefine GmbH e.a. tegen Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft e.a* [2014] Electronic Reports of Cases; Raad van State C-201311081/2/A1.

72 Case C-81/14 *Nannoka Vulcanus Industries BV tegen College van gedeputeerde staten van Gelderland* [2015] Electronic Reports of Cases; Raad van State C-201205897/2/A4.

73 Case C-165/09 *Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen* (*C-165/09*) *and College van Gedeputeerde Staten van Zuid-Holland* (*C-166/09 and C-167/09*) [2011] ECR I-04559; Raad van State C-200708144/1/M1-A.

74 Case C-359/08 *Stichting Greenpeace* [2009], but rather see C-552/07 *Azelvandre* [2009] ECR I-00987; Raad van State C-200702758/3/M1.

75 Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405; Raad van State C-200000690/1-A & A200101670/1-A.

discharge,[76] the transportation of waste,[77] dikes,[78] biocides,[79] and finally, the import of a bird protected under national law.[80] Article 21 of the Dutch Constitution stipulates: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.' More specifically, these authorities pertain to the central and local governments, as well the water bodies authorities. Seeing as the environmental maintenance and protection is a task for the national authorities, the majority of environmental law thus falls under Dutch administrative law, although enforcement can also be achieved through criminal and civil law. In the Netherlands, the court of last resort in environmental cases is the *Raad van State* (Council of State), the highest administrative court in the Netherlands. This explains why the majority of the referrals mentioned above came from this court. For a recent overview of the general and peculiar features of the judicial administrative review systems in the Netherlands from a comparative perspective, we direct the reader to Backes and Eliantonio's edited book on judicial review of administrative acts.[81] Given the space at our disposal, this section focuses directly on our empirical findings. Three forms of cooperation have emerged from this study: (a) full

76 Case C-232/97 *L. Nederhoff & Zn. v Dijkgraaf en hoogheemraden van het Hoogheemraadschap Rijnland* [1999] ECR I-06385; Raad van State C-E03951345; Case C 231/97 *A.M.L. van Rooij v Dagelijks bestuur van het waterschap de Dommel* [1999] ECR I-06355; Raad van State C-E03950877. Both Dutch cases were received from the Council of State by letter on 6 April 2017.

77 Case C-241/12 & 242/12 *Shell Nederland Verkoopmaatschappij BV en Belgian Shell NV* [2013] Electronic Reports of Cases; Rechtbank te Rotterdam C-10/994503-09; Case C-116/01 *SITA EcoService Nederland BV, formerly Verol Recycling Limburg BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [2003] ECR I-02969; Raad van State C-E03.99.0042 & E03.99.0043, received from Raad van State by letter on 6 April 2017; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-04075; Raad van State C-E03950106, received by letter from Raad van State on 6 April 2017.

78 C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403; Raad van State C-E01950318, received from the Raad van State by letter on 6 April 2017.

79 Case C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden* [2010] ECR I-13119; College van Beroep voor het Bedrijfsleven C-AWB 07/577 A; Case C-281/03 *Cindu Chemicals BV and Others* (*C-281/03*) *and Arch Timber Protection BV* (*C-282/03*) *v College voor de toelating van bestrijdingsmiddelen* [2005] ECR I-08069; College voor Beroep voor het Bedrijfsleven C-AWB 00/689 02/1502 & 02/1504.

80 Case C-169/89 *Gourmetterie Van Den Burg* [1990] ECR I-02134; Hoge Raad C-85314, received from the Hoge Raad by letter on 10 April 2017.

81 C. Backes & M. Eliantonio *Judicial Review of Administrative Action* (Hart Publishing, 2018).

cooperation, (b) withdrawn cooperation and (c) gapped cooperation. These categories are discussed below.

3.1 *Full Cooperation*

National courts, in the light of the principle of sincere cooperation, have to ensure that the judicial dialogue between them and the CJEU runs smoothly by demonstrating cooperative behavior in applying the CJEU's guidance. Differently than in Sweden, UK judges seem more prone to fully cooperate with the CJEU once they receive an answer to their preliminary questions.[82] Dutch courts follow the UK approach in most of the cases. Indeed, the majority of national cases, 13 out of 16, fall under the category of full cooperation of the national court with the CJEU's ruling.[83] That is to say, the national court used the questioned EU provisions in the manner that the CJEU explained. Not all 13 successful interplays can be discussed here. Two cases have been selected based on the characteristics that show a particularly successful or interesting cooperation.

One successful interplay took place in a criminal case: Joined Cases C-241/12 & 242/12 *Shell Nederland & Belgian Shell*.[84] Shell Nederland & Belgian Shell ('Shell') were criminally prosecuted for transporting 'a consignment of ultra light sulphur diesel unintentionally mixed with methyl tertiary butyl ether (…) from Belgium to the Netherlands.'[85] After the unintentional mixing, the batch was no longer useful to the buyer and would be returned to the seller. Several issues arose: first, whether the batch should be regarded as waste within the meanings of Regulation No. 259/93, and second, whether returning the batch should be regarded as 'discarding' in the sense of Article 1(1)(a) of Directive

82 See above Section 2.3.

83 C-158/15 *Elektriciteits Produktiemaatschappij Zuid-Nederland*; Raad van State 201404521/2/A1; C-191/14 *Borealis Polylefine*; Raad van State C-201311081/2/A1; C-81/14 *Nannoka Vulcanus Industries*; Raad van State C-201205897/2/A4; C-359/08 *Stichting Greenpeace;* Raad van State C-200702758/3/M1; C-232/97 *Nederhoff;* Raad van State C-E03951345; C-72/95 *Kraaijeveld & others*; Raad van State C-E01950318; C-127/02 *Waddenvereniging & Vogelbescherming;* Raad van State C-200000690/1-A; A200101670/1-A; C-116/01 *SITA*; Raad van State C-E03.99.0042 & E03.99.0043; C-203/96 *Chemische Afvalstoffen Dusseldorp*; Raad van State C-E03950106; C-266/09 *Stichting Natuur & Milieu;* College van Beroep voor het Bedrijfsleven C-AWB 07/577 A; C-281/03 *Cindu Chemicals;* College van Beroep voor het Bedrijfsleven C-AWB 00/689 02/1502 en 02/1504; C-241/12 & 242/12 *Shell Nederland & Belgian Shell*, Rechtbank te Rotterdam C-10/994503-09; C-169/89 *Gourmetterie Van Den Burg*; Hoge Raad C-85314, received by letter upon request from the Hoge Raad on 10 April 2017; C-165/09 *Stichting Natuur en Milieu*; Raad van State C-200708144/1/M1-A.

84 C-241/12 & 242/12 *Shell Nederland & Belgian Shell*, Rechtbank te Rotterdam C-10/994503-09.

85 C-241/12 & 242/12 *Shell Nederland & Belgian Shell.*

2006/12/EC. If the transfer of the batch falls in this category it would mean that the 'discarder', in this case Shell, would have to notify Dutch authorities that it was going to transport the batch from Belgium back to the Netherlands. In this regard, the *Rechtbank te Rotterdam* (District Court) referred to the CJEU in order to establish whether Shell should be labelled a discarder in the sense of Art. 1(1)(a) Directive 2006/12. In determining whether the mix was to be labelled as waste, the CJEU focussed on the intention of Shell regarding the batch.[86] It was found that Shell, after taking the consignment back, would blend it with another substance in order to ready the mix to be put back on the market. The element of placing the mix back on the market was decisive in coming to the conclusion that the substance could not be regarded as waste in the sense of Regulation No. 259/93. It follows that the substance cannot be discarded of in the sense of Art. 1(1)(a) Directive 2006/12. The District Court followed the CJEU in its interpretation. It included in its own ruling the question asked, and integral parts of the answers in the preliminary ruling. On the basis of the interpretation provided the District Court ruled that indeed, the batch should not be regarded as waste, therefore Shell could not be labelled a 'discarder.'[87] To that effect, Shell was not in the wrong for not notifying the relevant Dutch authorities of the shipment of the batch. The District Court included the preliminary ruling by the CJEU to a high extent in its own ruling. That is why the judicial cooperation in this case was successful.

Second, full cooperation occurred the Case C-165/09 *Stichting Natuur & Milieu*.[88] The case concerned several permits issued for the construction and operation of power stations in the provinces of Groningen and South Holland that would add to the national emission ceiling of greenhouse gasses such as sulphur dioxide (SO_2) and nitrogen oxides (NO_x). The question arose whether the orders to issue these permits pursuant to the Directive 96/61/EC, concerning integrated pollution prevention and control, should have been interpreted in the light of Directive 2001/81/EC (the NEC Directive). The CJEU found that, in the decision whether a permit should be issued for installations such as those under discussion, the obligations under the NEC Directive and the likelihood of obtaining the national emission ceilings therein indicated do not have to be a reason to refuse a permit. The CJEU also noted that the Member States are still under the obligation to achieve the goals as set out in the NEC Directive, however these goals do not have to stand in the way of new power stations, especially when they will not significantly contribute to the emission ceilings.

86 Ibid.

87 Rechtbank te Rotterdam 10/994503-09.

88 Case C-165/09 *Stichting Natuur & Milieu;* Raad van State 200708144/1/M1-A.

The Raad van State mentions all answers provided by the CJEU and follows that reasoning in the national case, especially at the beginning. The Raad van State copied the interpretations provided by CJEU and used them as intended in the case. It therefore falls within the successful dialogue categorisation.

3.2 *Withdrawn Cooperation*

A peculiarity of the EU judiciary system is its unwritten *stare decisis* system confirmed by the '*acte eclaire*' doctrine declared in *Da Costa*[89] and *CILFIT*.[90] Consequently, preliminary questions having similar answer to that an earlier case will be answered by the CJEU by suggesting the national court to apply the CJEU's ruling in the earlier case and to withdraw its preliminary ruling request. We call these cases, *withdrawn* cooperation. If correctly applied, this procedure leads to full cooperation. Yet, the renowned *Köbler* case shows that withdrawn cases can also lead to uncooperation, thus forming an example of judicial uncooperation category.[91] In the Netherlands, we found evidence of withdrawn cooperation leading to full cooperation.

The single example of an interplay that was withdrawn is the *Stichting Greenpeace* case.[92] A French national court asked similar question as the ones posed by the Raad van State. Therefore, the Raad van State was asked to withdraw its preliminary reference and use Case C-552/07 *Azelvandre*.[93] The case concerned a permit issued for the growth of genetically modified corn, and the meaning of 'place of introduction' in Article 25(4) of Directive 2001/18/EC. The case should be viewed in the light of the Aarhus Convention and the right of access to information:[94] citizens have the right to access to information such as where genetically modified vegetables are farmed. The right is not absolute and should be weighed against the interest of entrepreneurial competition and confidentiality.[95] It can be in the interest of farmers of genetically modified vegetables to not declare the exact whereabouts of the farm. It can thus be allowed to interpret 'place of introduction' broadly and give, for example, a

89 Joined Cases 28 to 30/62 *Da Costa en Schaake* [1963] ECR 31.

90 Case C-283/*81 CILFIT*. On this doctrine see Rasmussen, *supra* n. 13; A. Arnull, see *supra* n. 13; F. Mancini & D. Keeling, see *supra* n. 13; P. Allott, see *supra* n. 13; Tridimas, see *supra* n. 9; Wattel, see *supra* n. 13; Fenger & Broberg, see *supra* n. 13; Heyvaert, Thornton & Drabble, see *supra* n. 10.

91 Case C-224/01 *Köbler* [2003] ECR I-10239, ECLI:EU:C:2003:513.

92 C-359/08 *Stichting Greenpeace;* Raad van State C-200702758/3/M1.

93 C-552/07 *Azelvandre.*

94 See generally Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

95 C-359/08 *Stichting Greenpeace*.

location that is 20 times larger than the actual farmland, or keep it entirely confidential outside of the application procedure. The CJEU emphasizes the importance of the right to access to information, and does not allow for it to be restricted when it is probable that the release of information will cause public unrest.[96] The Raad van State copied the approach set out in *Azelvandre* and declared that in this case, the minister wrongfully allowed for the 'place of introduction' of genetically modified corn to remain confidential.[97] The Raad van State included the questions asked in the preliminary ruling and quite extensively the answers thereto as given in *Azelvandre*. Furthermore, it based its final decision on these findings. On account of the integrated preliminary ruling in the national case, it can be stated that the judicial dialogue in the *Stichting Greenpeace* case was one of full cooperation.

3.3 *Gapped Cooperation*

Two cases that did not contain a cooperative interplay between the CJEU and Dutch national courts are the cases concerning the subject matter discussed in C-231/97 *Van Rooij* and C-521/12 *Briels*. In both cases, a gapped cooperation took place, thus there has been a lack of successful judicial dialogue between the CJEU and the national court.

The first case discussed here is the *Briels* case,[98] which concerned the broadening of the road A2 between the cities of 's-Hertogenbosch and Eindhoven, lying in the south of the Netherlands. The decision to enlarge the road was taken by the minister of infrastructure and environment on 6 June 2011. According to the first impact assessment, a broader A2 would mean more emissions of nitrogen, which would be detrimental to the Natura 2000 site established by the European Commission in 2004 around the area of the A2. The site entailed the grass type molinia meadows occurring in Vlijmens Ven, Moerputten and Bossche Broek. In order to safeguard the conservation objectives for the Natura 2000 site, the minister issued another order that imposed certain measures that would allow for more molinia meadows to grow in a certain part of the site. Yet the affected area would not be less affected and would still experience the negative implication from the larger roadway. That is why Briels and Others brought an action against the two orders. In their view, the improvement and enlargement of the Natura 2000 site in one part could not mitigate the negative effects of a project on another part of the site.

Because the Raad van State was not sure how to categorise the orders of the minister, it referred a question to the CJEU regarding the conservation

96 C-552/07 *Azelvandre*.

97 Raad van State, C-200702758/3/M1.

98 Case C-521/12 *Briels*; Raad van State C-201110075/4/R4 & 201201853/3/R4.

requirements of the habitat. The question was whether 'the integrity of the site is not adversely affected if in the framework of the project an area of that natural habitat type of equal or greater size [to the existing area] is created within that site?'[99] The CJEU took the view that the question was essentially whether the orders of the minister were in line with Article 6 of the Habitats Directive, and specifically with provisions 3 and 4 thereof. The CJEU found that the area of molinia meadows that would be added could not be taken into account as a mitigating measure when examining the negative effects of the roadway project, but merely as a compensating measure. A compensating measure, as opposed to a mitigating measure, cannot be taken into account in the assessment as laid down in Article 6(3) Habitats Directive.[100]

The reaction of the Raad van State and the minister following the CJEU's findings is quite interesting. In the first place, the situation of the case changed as a result of a new scientific study introduced by the minister approximately one month after the CJEU had issued the preliminary ruling. The new study demonstrated that the effect of the roadway project on the Natura 2000 site could not be regarded as significantly negative; the expected amount of nitrogen was found to be considerably lower than the old study had found. The Raad van State saw no reason not to allow the new study into the case.[101] Furthermore, the Raad van State stated that the project of adding an areal of molinia meadows on the Natura 2000 site should be regarded as conservation measures in the expected line of development. As the Raad van State explained, this means that the projects is likely to be realised to such an extent that it can be regarded as already present, as established in the Council of State's own case law.[102] It should therefore be integrated in the assessment meant in Article 6(3) of the Habitats Directive. The reasoning to not apply the ruling of the CJEU here was based on the notion that the factual situation was different from the one in the light of which the Raad van State had referred a question to the CJEU. A question now referred based on two latter cases.[103] The Raad van State hereby questioned the validity of the judgment without requesting supplementary guidance by referring back to the CJEU. An approach proved

99 Case C-521/12 *Briels*.

100 Ibid.

101 Raad van State C-201110075/4/R4 & 201201853/3/R4.

102 Ibid.

103 Raad van State, ECLI:NL:RVS:2017:1259 and Raad van State ECLI:NL:RVS:2017:1260.

to be in contrast with EU law, following the *Orleans* case,[104] as extensively discussed in another publication.[105]

In the light of the foregoing, several remarks should be made. The Raad van State stated that the context of the case has changed while the case was still on-going. For that reason it can then be asserted that the judicial cooperation discussed here should fall in Bogojević's category of an interrupted interplay. Such a categorisation, however, does not illustrate the situation sufficiently. After the determination that the A2 roadway project would not have the expected detrimental effects to the molinia meadow fields, the Raad van State had several opportunities to refer another preliminary question to the CJEU. The case concerned EU law that was far from unambiguous. For example, the Raad van State has decided in its own case-law that measures which can be factually expected can be regarded as a factual development and should be included in the impact assessment. While it would have been sensible to do so, no preliminary reference has been made to ensure that this conclusion is in line with EU law. The Raad van State has decided upon its own initiative that the measure in question can be viewed as reality already. In the light of sincere cooperation stipulated in Article 4(3) TEU, the Raad van State could have referred the situation to the Court of Justice. The interplay here therefore falls into the 'gapped' category, making the cooperation unsuccessful.

Also in the Case C-231/97 *Van Rooij* a gapped cooperation took place.[106] It concerned discharge and the scope of its meaning in Article 1(2)(d) Directive 76/464/EEC, and the pollution of surface waters. In the case that a certain emission can be labelled as discharge, according to Article 7(2) of the same Directive, the emitter needs 'prior authorisation by the competent authority in the Member State.' Pollution of surface water had come about through the emission of polluted steam that precipitated on nearby waters. The appellant had requested enforcement measures against the pollution. When the case

104 Joined Cases C-387/15 and 388/15, *Hilde Orleans and Others v Vlaams Gewest*, ECLI:EU:C:2016:583. See also H. Schoukens, 'Habitats Restoration Measures as Facilitators for Economic Development within the Context of EU Habitats Directive: Balancing No Net Loss with the Preventive Approach?' [2017/29] *Journal of Environmental Law* 47–73; R.H.W. Frins, 'Het Arrest Orleans e.a.: het PAS en Natuurmaatregelen Veroordeeld tot de Brandstapel?' [2016/147] *Tijdschrijft voor Bouwrecht*, 926–33; R.H.W. Frins, 'Mitigatie, Compensatie en Saldering in het Omgevingsrecht' (dissertation, Nijmegen, 2016), *Stichting Instituut voor Bouwrecht* 52–72.

105 J. Zijlmans & L. Squintani, Toepassing van de CILFIT-doctrine door de Afdeling Bestuursrechtspraak Raad van State: de ingevolge de Habitatrichtlijn te Treffen Mitigerende (en Compenserende) Maatregelen, Tijdschrift voor Natuurbescherming, 2018/2.

106 Case C-231/97 *Van Rooij;* Raad van State C-E03950877.

came before the Raad van State, it decided to stay the proceedings and refer a question to the CJEU.

The answer was brought on the same day as the *Nederhoff* ruling, as both cases took place before the Raad van State and concerned the same question about the meaning of the term 'discharge.' Also in this case the CJEU concluded that the meaning of 'discharging' covered the circumstances.

The Raad van State followed this interpretation and labelled the precipitation of steam as discharge. However, as a study by the defendants had shown, this discharge had had no significant negative effects on the health of people living in the area where discharge precipitated. The Raad van State therefore found in favour of the defendant in that it was not necessary to have a permit for such discharge. The Raad van State decided that the discharge was not harmful on grounds that were not refuted, while it still followed the interpretation from the CJEU. Of course, it was not in the scope of interpretation for the CJEU to decide whether a permit should be requested from the defendant. However, seeing the context in which the determination of 'discharge' is made it can be argued that by labelling the precipitation as discharge, the Court of Justice also meant that the discharge was harmful, through which a permit would be needed. Such an interpretation can be distilled from the way discharge is defined in combination with the definition of pollution.[107] In order to ascertain whether the term discharge could also be used as being harmless the Raad van State could have referred another question. Therefore, also the interplay occurred in this case can be labelled as gapped.

4 Synthesis and Comparison

It was noted previously in Bogojević's contribution that the Swedish courts displayed a more diverse array of judicial cooperation. They ranged from complete non-implementation of the CJEU's ruling to the non-referral of certain legal issues raised in the national proceedings, followed by ambiguous and legally intricate responses from the CJEU. Conversely, something different emerged in the UK. UK judges tend to follow the CJEU's rulings as closely as possible.[108] They give full account of the CJEU's reasoning, therefore refraining

107 Article 5 Directive 76/464, Case C-231/97: '"pollution" means the discharge by man, directly or indirectly, of substances or energy into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interference with other legitimate uses of water.'

108 We remind here that Scottish courts have not made preliminary references in environmental matters.

from engaging in silenced cooperation. In the Netherlands, we see a somewhat mixed practice.

First, no interchanged, interrupted, silenced, fragmented and presumed interplay could be found within the 16 environmental law cases researched between 1995 and 2016 in the Netherlands. Only two of the 16 cases under discussion contained gapped interplays. 13 cases can be categorised under full cooperation, with one other case that could be categorised as withdrawn, after which the answer from another case was still correctly used, resulting in 14 cooperative and two uncooperative interplays in total. It can therefore be concluded that the Dutch judiciary tens to cooperate with the CJEU. Within the successful interplays between the national courts and the CJEU, the former uses the interpretation provided by the latter in manners that do not deviate from the intention of that interpretation, which can especially be seen by the frequently directly copied judgments into the national case.

This is not true for the two gapped interplays, where the Raad van State used the interpretations provided in a manner that would not find support from the CJEU, as it deviates from the arguments made by the CJEU in its ruling. Especially in the *Briels* case this can be found to have significant negative effect upon environmental protection, as the broadening of the A2 highway is a project with major impact upon the environment.

In addition, a new category of judicial interplay was discovered, that of withdrawn cooperation. The implied stare decisis system embedded under Article 267 TFEU has thus an effect on judicial cooperation. The case here discovered led to a national court judgment that is in line with the CJEU's ruling used to withdrawn the preliminary reference. Yet, in the future, or in other jurisdictions, cases of withdrawn uncooperation could occur, as suggested by the *Köbler* case. Additional mapping is thus necessary. The known part of the judicial dialogue in the environmental matters map can thus be shaped as it follows.

The marked difference in the outcomes of the empirical research in Sweden and the UK suggested the national judicial culture has a strong impact on judicial dialogue.[109] The findings from the Netherlands, especially the two cases of gapped cooperation suggest that rather than speaking about judicial cultures in general, a case-by-case analysis of the reasons beyond national courts behaviour is necessary. Why did Dutch courts decide in the *Van Rooij* and *Briels* not to cooperate with the CJEU? Was this intentional, as the clarity of the non-cooperation suggests, or unintentional? What explains either scenario? Empirical research going beyond the 'what' question posed in this study is thus necessary to unveil judicial dialogue fully.

109 Squintani and Rakipi, see *supra* n. 18.

FIGURE 1 *Map of judicial dialogue in environmental matters in the EU (3 MS). Derived from Council of the European Union; Lovell Johns*

5 Conclusions

This study shows that Dutch courts tend to cooperate fully with the CJEU. The interplays found in the Netherlands fall mostly in the categories of successful cooperation, while no interchanged, interrupted, or silenced interplays took place. Besides, one new category of judicial cooperation has been highlighted in this regard: withdrawn cooperation. This finding confirms that mapping judicial dialogue is an ongoing process.

Finally, two judgments shown cases of gapped cooperation, hence of uncooperative behaviour of Dutch courts. While in the UK and in Sweden only cases of cooperative dialogue, respectively uncooperative dialogue were found, in the Netherlands, we have retrieved examples of both. This suggests that individual circumstances influence national courts behaviour. If confirmed, this means that follow up research has to focus on a case-by-case appraisal of the reasons for cooperate or not cooperate with the CJEU. The study of national judicial cultures in general does not seem to suffice.